

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

SOVERAIN SOFTWARE LLC,

Plaintiff,

V.

(1) AMAZON.COM INC.

(2) THE GAP, INC.,

Defendants.

Civil Action No. 6:04cv14

Hon. Leonard E. Davis

**PLAINTIFF'S SUR-REPLY TO DEFENDANTS'  
REPLY IN SUPPORT OF THEIR JOINT MOTION  
TO ENFORCE COMPLIANCE WITH P.R. 3-7 BY  
STRIKING AMENDED COMPLAINT**

One searches defendants' reply brief in vain for any acknowledgment that the reply has been served in disregard of Local Rule CV-7(f). The five day period for the service of reply briefs does not justify the thirteen days taken by defendants, nor is there any excuse for their failure to request permission to file an untimely reply.

Defendants' reply brief also is silent with respect to the facts set forth in Sovereign's response brief. Defendants do not dispute that:

- Sovereign filed its Amended Complaint within the time period expressly provided for in the Docket Control Order.
- The Amended Complaint would result in the assertion in this case of only four new patent claims.

- A series of good reasons exist as to why these new patent claims should be tried together with the claims already in this action.
- Options exist which would permit the new patent claims to be accommodated with little or no disruption to the schedule in this case.
- The striking of the Amended Complaint advances no interest.

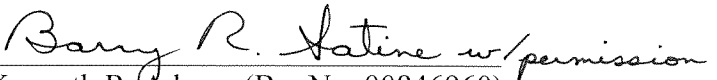
Even more importantly, defendants fail to address the fundamental question presented by this motion -- where the Docket Control Order permits pleadings to be amended by a specified date, and the parties amend their pleadings on the specified date, but the date falls within the time period for the Initial Disclosure Process under Patent Rule 3, how are such amended pleadings to be accommodated under the schedule?

Defendants' reply to this question is to misconstrue F. R. Civ. P. 16(b) and to argue that the fundamental question need not be addressed. Most assuredly, F. R. Civ. P. 16(b) provides that a scheduling order may not be modified except upon a showing of good cause. Rule 16(b) also provides that a scheduling order shall establish a date for the amendment of pleadings. It is the defendants who seek to nullify that date, with their contention that a timely amended pleading is to be stricken.

Soverain has presented various reasonable alternatives for addressing the instant situation and for answering the scheduling issue which has arisen. Defendants cannot simply wish away the four new patent claims in the Amended Complaint. One way or another they will be the subject of litigation between the parties, and the only question is how and when. Soverain has complied with the Docket Control Order, and the subject for discussion should be how to best

accommodate the amended pleading in the existing schedule. Unfortunately, this is a discussion in which the defendants do not wish to participate.

Respectfully submitted,

  
Kenneth R. Adamo (Bar No. 00846960)  
Attorney In Charge  
JONES DAY  
2727 North Harwood Street  
Dallas, Texas 75201  
Telephone: (214) 220-1515  
Facsimile: (214) 969-5100  
E-mail: kradamo@jonesday.com

Thomas L. Giannetti  
Barry R. Satine  
Ognjan V. Shentov  
Jennifer Seraphine  
JONES DAY  
222 East 41<sup>st</sup> Street  
New York, New York 10017  
Telephone: (212) 326-3939  
Facsimile: (212) 755-7306  
E-mail: tlgiannetti@jonesday.com

Carl R. Roth (Bar No. 17312000)  
Michael Smith (Bar No. 18650410)  
THE ROTH LAW FIRM LLC  
115 N. Wellington, Suite 200  
Marshall, Texas 75670  
Telephone: (903) 935-1665  
Facsimile: (903) 935-1797  
E-mail: cr@rothfirm.com

ATTORNEYS FOR PLAINTIFF  
SOVERAIN SOFTWARE LLC

**PROOF OF SERVICE**

The undersigned certifies that on the 22<sup>nd</sup> day of November, 2004, the foregoing pleading was electronically filed with the Court. Pursuant to Local Rule CV-5, this constitutes service on the following counsel:

Max. L. Tribble

mtribble@susmangodfrey.com

Victoria Capitaine

vcapitaine@susmangodfrey.com

Parker C. Folse III

pfolse@susmangodfrey.com

Brooke A. M. Taylor

btaylor@susmangodfrey.com

David A. Nelson

dnelson@lw.com

Eric Findlay

efindlay@rameyflock.com

J. Christopher Carraway

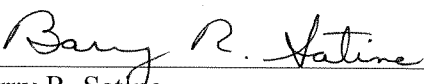
christopher.carraway@klarquist.com

Richard D. McLeod

rick.mcleod@klarquist.com

John D. Vandenberg

john.vandenberg@klarquist.com

  
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Barry R. Sattine